

SUBJECT: Criminal barratry offense; lawyer advertising standards

COMMITTEE: Criminal Jurisprudence — committee substitute recommended

VOTE: 9 ayes — Place, Hartnett, Allen, Combs, Granoff, Greenberg, Nieto, Solis, Talton

0 nays

2 absent — De La Garza, Stiles

WITNESSES: For — Richard Hile, Texas Trial Lawyers Association; Tom Edwards, Houston Trial Lawyers Association; Carroll L. Darrow, R.W. Lynch Co., Inc.)

Against — None

On — John M. Richards, Lonny D. Morrison, State Bar of Texas.
(Registered only — Karen Johnson, James M. McCormack, State Bar of Texas.)

BACKGROUND: Penal Code sec. 38.12 provides that a person commits the offense of barratry if, with intent to obtain an economic benefit, the person or someone the person has procured solicits employment to prosecute or defend a suit or to collect a claim. The offense is a class A misdemeanor, punishable by a maximum one year in jail and a \$3,000 fine.

A repeat offense of solicitation of employment is a third degree felony, with a maximum penalty of 10 years in prison and a \$10,000 fine, if the solicitation occurred in a hospital, funeral establishment, cemetery or scene of an accident, by using an employee of the state or local government or of a hospital or funeral establishment or by impersonating a clergyman, public employee or emergency assistance worker or volunteer. Final conviction is considered a "serious offense" under State Bar disciplinary rules.

DIGEST: CSHB 2506 would revise the Penal Code barratry offense and add a new provision to the Government Code regulating solicitation and advertising.

Accident reports required to be filed under the traffic laws would have to designate whether a person involved in an accident desired to be contacted by persons seeking professional employment. This information could not be used as evidence in a civil trial.

Prohibited solicitation under the Penal Code would not apply to advertising through the public media but it would apply to written communication to prospective clients or their families about particular occurrences or legal problems.

The barratry offense would be revised to prohibit a person, with intent to obtain economic benefit:

- knowingly instituting a suit or claim the person has not been authorized to pursue;
- soliciting employment for himself or another either in person or by telephone;
- paying a prospective client to obtain legal representation;
- paying someone to solicit employment;
- paying a family member of a prospective client to solicit employment; or
- accepting anything of value to solicit employment. These actions would be third degree felony.

Licensed attorneys, chiropractors, physicians, surgeons or other health care professionals would commit an offense if they knowingly financed or invested funds or accepted employment that constituted barratry, unless allowed by professional disciplinary rules. These actions would be a third degree felony.

The listed professionals would commit a class A misdemeanor offense (third degree felony for a repeat offense) if they sent or knowingly permitted to be sent to someone who has not sought their services a written communication:

- concerning an accident or disaster involving a person or the person's relative sooner than the 31st day after it occurred;
- concerning legal representation when they knew or should have known the person already is represented;

- concerning an arrest or summons sooner than the 31st day after it occurred;
- concerning a lawsuit, including a divorce action, to a person or the person's relative sooner than the 31st day after the suit is filed;
- sent knowing that an injured person or the person's relative had indicated a desire on a traffic accident report not to be contacted about employment;
- involving coercion, duress, fraud, overreaching, harassment, intimidation or undue influence; or
- containing false, fraudulent, misleading, deceptive or unfair statements or claims.

A new provision would be added to the Government Code regulating information concerning lawyer services.

The bill sets specific guidelines for the advertising of legal services through both public media (television, radio, newspapers) and private, written communication (letters) within the state. Broadcast advertising could not include sounds such as sirens, crashing vehicles, persons crying, or any music other than instrumental. Information could not be given by a celebrity and could not include a dramatization.

All written communications would have to be marked "ADVERTISEMENT" in red ink, in the lower left corner of the front of the envelope. No communication to a prospective client could be sent by registered mail.

All information would have to factually substantiated and could not state or imply that the services of a particular lawyer or firm are superior to those of others. If a lawyer stated a fee in an advertisement, it would have to be honored for at least 90 days, and if the advertisement appeared in a telephone book, the fee would have to be honored for one year. The advertisement would also have to disclose the geographic location of the office.

A Committee on Advertising would be created as a permanent committee of the State Bar to administer the requirements of the provision and issue advisory opinions concerning contemplated advertising or written communications.

Attorneys advertising through public media or written communication, not involving solicitation, would be required to file a copy with the committee, either before or concurrently with its dissemination. However, certain communications would be exempt from the filing requirement, such as an announcement about a new office or a newsletter to former clients. The board of directors would annually set a filing fee.

The committee would make a decision on the communication within 21 days of the receipt of the filing. However, if it find reasonable doubt that the communication complies with the requirements, it could extend the period if the lawyer was notified. If the committee found the communication not to be compliance, the attorney would be notified that he or she could be professionally disciplined if the communication was disseminated or the dissemination did not cease.

A lawyer would be prohibited from giving anything of value to a prospective client or lay person in order to secure that person as a client. However, a lawyer could use a lawyer referral service. Other provisions would regulate the advertising of two or more lawyers not in the same law firm.

The bill would also regulate how attorneys could hold themselves out as specialists and would specify how attorneys could use trade names and firm names in their practice.

The bill would take effect January 1, 1994.

**SUPPORTERS
SAY:**

In 1989, a semi-truck crashed into a busload of schoolchildren near Mission, Texas, killing 21 and injuring 61. Lawyers and their employees rushed to Mission in an attempt to successfully solicit business from the parents of the deceased and injured children. A similar situation occurred in 1988, when the roof collapsed in a Brownsville store. These incidents and others like them have angered and outraged lawyers and non-lawyers alike. Persons suffering the loss or injury to a loved one are often barraged by professional solicitations. CSHB 2506 would place reasonable limits on solicitation as well as professional advertising to prevent intrusive and often illegal solicitation.

A few unethical lawyers have given a bad name to the profession. CSHB 2506 seeks to eliminate solicitation that has no purpose other than to misinform or to appeal to the emotions of vulnerable people. Unethical attorneys often use police accident report information to solicit business. Law firm secretaries, tow truck drivers, body shop workers, and police officers are used to bring in information about recent accidents, and receive generous compensation for this information. Persons recently released from jail on bail and those whose spouses have filed for divorce also are targets. Attorneys or their "runners" solicit in hospitals, cemeteries, and funeral parlors, causing distress and confusion. These runners have even been known to impersonate Red Cross workers to solicit business from accident victims.

Choosing an attorney is an important decision. Prospective clients should not make such a decision when they are grieving over the injury or loss of a loved one. Although those with lower incomes, who are often the target of solicitation, have a right to representation, they also deserve truthful information and the right to be left alone after a shocking experience. A one-month moratorium on solicitation would be more than reasonable.

The practice of law is a licensed profession, and therefore the conduct of attorneys can be regulated. The state may put limits on the professional conduct of those who practice under a state-issued license, including reasonable regulation of advertising and solicitation to protect the public.

Claims that these provisions are unconstitutional are unfounded. The courts have determined that a waiting period similar to that in CSHB 2506 can be required to prevent intrusive invasion at a time when a family is grieving and vulnerable.

CSHB 2506 would help deter false advertising and intrusive solicitation by broadening the criminal barratry offense. For instance, the definition of "barratry" would be broadened to include third party solicitation (runners) and would make more forms of barratry a felony, rather than a misdemeanor, on the first offense. This is particularly important since a felony conviction usually results in automatic disbarment for attorneys.

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**OPPONENTS
SAY:**

CSHB 2506 would not simply prohibit false or misleading advertising but also what some people feel is distasteful. But what some consider to be tasteless can be necessary information for others, particularly those with lower incomes and who are not familiar with the English language. Those who lack the knowledge to seek out legal help should not be prevented from receiving information about how they can protect their rights.

This bill seeks to criminalize legitimate written communication to convey information. An attorney could spend a year in jail simply for mailing a letter less than 31 days after an incident occurred seeking to provide professional services that a person might desperately need. Unwarranted intrusion and unethical behavior to obtain employment can be regulated under professional conduct standards without adding detailed, constitutionally questionable, prohibitions to the criminal statutes.

NOTES:

The committee substitute added a number of provisions to the original version, including the provision creating the State Bar Committee on Advertising, its makeup and functions.

SB 1227 by Henderson, amending the barratry offense, and SB 1228 by Henderson, regulating advertising, have both been favorably reported by the Senate Jurisprudence Committee.